Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CATHERINE L. TURNER FULK,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court, in its discretion under Supreme Court Rule 10, should issue a writ of certiorari where no important question of federal law is presented for determination by this Court; where no federal question has been decided by the Court of Appeals in a way that conflicts with applicable decisions of this Court or other courts; and where the petition fails to present any special and important reasons for review.

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

The petitioner incorrectly premised this Court's jurisdiction upon Supreme Court Rules 12 and 13, which do not confer jurisdiction. This Court's jurisdiction properly is invoked pursuant to 28 U.S.C. § 1254(1).

* Illinois Central Railroad Company is a corporation which is a subsidiary of Illinois Central Corporation. Illinois Central Railroad Company does not have any subsidiaries itself. Equitable Companies, Inc. owns 10.80% of the stock of Illinois Central Corporation and FMR Corp. owns 11.08% of the stock of Illinois Central Corporation.

STATEMENT OF THE CASE

All facts necessary to the disposition of the petition are adequately set forth in the decision of the Court of Appeals for the Seventh Circuit, which is reported at 22 F.3d 120 (7th Cir. 1994). Hence, respondent in accordance with Rule 24.2, will rely on the facts as articulated by the court below.

SUMMARY OF ARGUMENT

This Court's review of an issue on writ of certiorari is warranted only where the petition presents special and important reasons for such consideration. *See* Supreme Court Rule 10. The issue decided below by the Seventh Circuit, namely, whether the district court erred in granting judgment as a matter of law to the Illinois Central Railroad Company ("the IC") on the allegation raised in paragraph 12(d) of Fulk's amended complaint, does not warrant this Court's review for several reasons. First, the issue of whether a railroad owes a duty under a specific set of factual circumstances is not an important question of federal law which should be decided and settled by this Court. Indeed, even as framed by petitioner, the question presented for review suggests little more than petitioner's dissatisfaction with the lower court's application of the facts to the applicable legal principles. Second, no conflict exists between the Seventh Circuit's decision below and any decision of this Court or any other court. Indeed, petitioner argues only that the question she has framed "has never been ruled on by this Court" (Petition at 7), but does not articulate any conflict in lower court decisions. Finally, petitioner has failed to present any principled reason for this Court's review of this matter.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS LIMITED TO THE DISCRETE FACTS OF THIS CASE AND IS IN HARMONY WITH PRIOR DECISIONS OF THIS COURT.

It is incumbent upon a plaintiff in an action under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* ("FELA"), to prove that the defendant was negligent and that such negligence was the proximate cause, in whole or in part, of an injury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943). Although the FELA eases a plaintiff's burden of proof from that imposed in a traditional negligence case, the existence of a duty owed by a railroad to the injured employee still is an essential element of establishing negligence. *Chesapeake & O. Ry. Co. v. Mihas*, 280 U.S. 102, 106 (1929). The question of whether the law imposes a duty upon a railroad is one of law, which is for the court in the first instance, and not the jury, to decide. *See Southern Pacific Co. v. Berkshire*, 254 U.S. 415, 417 (1921). The determination of whether a duty exists must be made in the context of the particular factual allegations and circumstances of each case and not pursuant to a broad and sweeping rule of law. *Delaware, L&W R. Co. v. Koske*, 279 U.S. 7, 11 (1929); *Baltimore & P. R. Co. v. Jones*, 95 U.S. 439, 442 (1877). The existence or nonexistence of a duty in a particular factual setting is not a question of pure statutory construction and is dependent on a variety of subtle and intricate distinctions related to the specific factual circumstances giving rise to the injury at issue. *Id.*

Petitioner erroneously contends that the issue presented in this case is appropriate for review by this Court. Petitioner's argument is without merit, however, as it signifi-

cantly misapprehends the nature of the issue presented. The court below did not construe any provision of the FELA. Rather, the court simply considered the factual allegations presented in the amended complaint and the testimony adduced at trial to determine whether the undisputed facts warranted imposition of a legal duty. Finding no legal precedent to warrant imposition of a duty on the facts presented, the district court entered judgment in favor of the defendant railroad on paragraph 12(d) of the amended complaint, which judgment was affirmed by the Court of Appeals for the Seventh Circuit. The decision below ultimately may prove illustrative in future cases involving similar factual allegations, but it is not susceptible to citation as having established a binding legal precedent with broad application in FELA cases as a whole. Accordingly, a decision by this Court will resolve only the narrow issue presented in this case, without settling any disputed issue of law or statutory construction applicable to a variety of factual circumstances.

Petitioner also suggests erroneously that the Seventh Circuit's decision somehow conflicts with this Court's decisions in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944), and *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). It does not. Neither *Tennant* nor *Rogers* addressed the issue of whether a railroad has a duty, as petitioner alleged, to examine an employee "more frequently with more detailed examinations," *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 122 n.1 (7th Cir. 1994). Indeed, the language of petitioner's allegation at issue demonstrates that its resolution depends on the facts and circumstances of this case. Moreover, in neither *Tennant* nor *Rogers* did this Court review a trial court's determination of whether a duty was owed under specific factual circumstances. In *Tennant*, the trial court had set

aside a jury verdict in favor of the plaintiff on the grounds that the facts presented did not establish the requisite element of proximate causation. This Court reversed, emphasizing that causation is a fact question to be decided by a jury. *Tennant*, 321 U.S. at 35. In *Rogers*, this Court reviewed the Missouri Supreme Court's reversal of a jury verdict in favor of the plaintiff, because the state high court had found that the plaintiff's own fault had contributed to his injury. This Court reversed, ruling that the plaintiff was entitled to a jury determination unless no reasonable juror could find that the employer's fault played any part at all in the employee's injury. Thus, *Tennant* and *Rogers* are largely inapposite.

Petitioner's argument is further misguided because, even though *Tennant* and *Rogers* are factually and legally dissimilar from the instant matter, the Seventh Circuit did consider and apply the general principles enunciated by this Court in those cases. Indeed, in affirming the trial court's entry of judgment on paragraph 12(d) of the amended complaint, the Seventh Circuit relied upon this Court's admonition in *Tennant* that "mere speculation be not allowed to do duty for probative facts." *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 126 (7th Cir. 1994), *citing Tennant*, 321 U.S. at 33. Therefore, despite the alleged differences between *Tennant* and this case, the Seventh Circuit easily harmonized the two decisions.

Petitioner's own arguments, which interpret and recast the testimony and evidence presented in the District Court illustrate the parochial nature of the petition. Petitioner simply seeks a third opinion on whether the established record in this case warrants imposition of a legal duty on the facts of this case. The decision below properly does not create a broad rule of law with widespread applicability. To the contrary, the decision below pertains

only to the specific evidence adduced at the trial of this cause and will be of little consequence in other proceedings. Review by this Court is unwarranted and unnecessary.

II.

THE OPINION BELOW IS MANIFESTLY CORRECT AND IS CONSISTENT WITH OTHER SIMILAR DECISIONS.

No federal court has presided over the precise facts and issues presented in this matter. Indeed, only three courts have addressed even remotely similar issues. Those courts, in *Moody v. Boston and Maine Corp.*, 921 F.2d 1 (1st Cir. 1990), *Fletcher v. Union Pacific R.R. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), and *McGuigan v. Southern Pacific R.R. Co.*, 277 P.2d 444 (Cal. App. 1954), rendered decisions that are in harmony with the opinion below.

In *Moody*, the First Circuit determined that the FELA does not require a railroad to perform periodic physical examinations on its employees. The court in *Moody* also determined that a railroad is liable only if, having undertaken to give a physical examination, the examination is performed negligently. The First Circuit in *Moody* further ruled that the law does not require follow-up medical examinations.

Here, in paragraph 12(d) of the amended complaint, petitioner does not allege negligent performance of a medical examination. To the contrary, petitioner sought to impose a duty upon the IC to perform examinations on the decedent "more frequently" and in more detail. *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 122 n.1 (7th Cir. 1994). The Seventh Circuit's ruling that the FELA provides no basis for the imposition of such a duty on the facts of

this case is entirely consistent with *Moody*. In fact, any decision to the contrary by the court below would have contradicted *Moody* and created an indirect conflict among the Circuits.

The Seventh Circuit's decision below likewise is consistent with *Fletcher*. Lending support for the Seventh Circuit's ruling here, the Eighth Circuit in *Fletcher* expressly stated that a railroad has no general duty to ascertain whether an employee is physically fit for his job. 621 F.2d 902, 909. Although the court in *Fletcher* held that a railroad is obligated to assign employees to work for which they are reasonably suited and that a railroad owes a duty not to perform physical examinations in a negligent manner, those duties are not implicated here. As noted above, petitioner did not allege in paragraph 12(d) the performance of negligent physical examinations. In fact, petitioner's medical expert witness conceded that he had no criticism of the railroad physician's examination. *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994). As the District Court noted, "[p]laintiff did not present any evidence that [decedent's] medical examination was negligently performed. In fact, [the physician] told decedent to return for an exam within 60 days. Plaintiff did not present any evidence that [decedent's] failure to return for a second exam was the result of [the physician's] negligence" (Petitioner's Appendix at 12a-13a). Likewise, petitioner did not allege negligent work assignment in paragraph 12(d). Accordingly, petitioner failed to allege facts sufficient to invoke the duties recognized in *Fletcher*, and the decision below is entirely consistent with the ruling in *Fletcher*.

McGuigan, a case decided by an intermediate state court of appeals, is of questionable significance in this matter, but the Seventh Circuit nonetheless considered *McGuigan*

in reaching its decision here. *McGuigan* recognized a duty on the part of a railroad to examine an employee where the railroad knows that the employee is in such poor physical condition as not to be able to handle his job without danger to his health, and where the employee is ignorant of these health limitations. Here, it is undisputed that both petitioner's decedent, and his employer, the railroad, became aware of his hypertension in 1983. *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 122 (7th Cir. 1994). Thereafter, his employer required periodic physical examinations to determine his fitness for work. Petitioner's decedent did periodically return for examinations, but after his final examination on September 29, 1989, he failed to return for additional examinations. Thus, consistent with *McGuigan*, the decedent was examined by his employer, and he was aware of his condition. The court below properly declined to create any further duty inconsistent with *McGuigan*.

Given the complete absence of any evidence of a treating physician's negligence, petitioner alternatively argued below that the railroad either should have been charged with requiring decedent to comply with his doctor's orders, or that decedent was unaware of the doctor's orders. The Seventh Circuit properly determined, in the absence of any remotely applicable authority, that an employer must not be charged with overseeing an employee's compliance with doctor's orders. Additionally, consistent with this Court's decision in *Tennant*, 321 U.S. at 33, the Seventh Circuit found petitioner's hypothesis, *i.e.*, that her decedent may not have been aware of the necessity of follow-up examinations in 1989 (despite his six-year prior history of examinations), was simply too speculative to warrant imposition of a duty.

The Seventh Circuit's decision below, declining to depart from prior precedent, is entirely consistent with *Moody*, 921 F.2d 1, *Fletcher*, 621 F.2d 902, and *McGuigan*, 277 P.2d 444. Any decision by the court below that had imposed a duty on an employer to oversee an employee's compliance with doctor's orders would have been "too paternalistic a mandate for a court to impose, even under the liberal strictures of the FELA." *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994).

III.

THE PETITION FAILS TO PRESENT SPECIAL AND IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI.

Review by this Court on writ of certiorari is not a matter of right, but is subject to judicial discretion. Review by this Court of a decision is proper only in the presence of special and important reasons. *See* Supreme Court Rule 10. Such special and important reasons for review include a conflict between that decision and a decision of this Court, a conflict between that decision and a decision of another Circuit Court of Appeals, and a need for a ruling by this Court to settle an important question of federal law. *See* Supreme Court Rule 10. Petitioner has failed to establish any special and important reason for this Court to review the decision of the Seventh Circuit below.

The Seventh Circuit's decision in this matter is not in conflict with any decision by this Court or by any other Circuit Court of Appeals on an important question of federal law. The Seventh Circuit's reasoning below properly interprets the FELA in the context of the complete absence of any negligence by the railroad's physician. Accordingly, the issue presented in this case does not war-

rant review by this Court. This Court previously and prudently has declined to announce broad rules of law prescribing under what factual circumstances one may recover for various injuries under the FELA and instead has allowed the lower federal courts to analyze each case on its own merits. This case involves a simple determination of whether the law imposed a duty upon a defendant under a defined set of facts. Thus, the petition fails to present any principled basis for this Court to depart from its prior disinclination to announce broad rules of law on issues which are not matters of pure statutory construction.

CONCLUSION

The issue Petitioner seeks to present to this Court is not a matter of statutory construction to be decided by this Court. It merely involves the application of general legal principles to a set of specific factual allegations. Moreover, there exists no conflict among the Circuits or between the decision below and a decision of this Court. The instant petition presents no important question of federal law warranting review by this Court. Accordingly,

and for the reasons set forth above, Respondent respectfully requests that the Court deny the petition.

Respectfully submitted,

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